

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

KENNETH C. SWANN, AND
REBECCA SWANN,

Plaintiff,

v.

DIAMOND STATE PORT,
CORPORATION,

Defendant.

C.A. No. 07-350-

Trial By Jury Demanded

2007 JUN -1 PM 4:18

U.S. DISTRICT COURT
DISTRICT OF DELAWARE

COMPLAINT

1. The plaintiffs, Kenneth C. Swann and Rebecca Swann, are married individuals who reside in the State of Delaware.

2. The defendant, Diamond State Port Corporation, is a corporation organized and existing under the laws of the State of Delaware, whose agent for service of process is: Diamond State Port Corporation, Robert F. Senseny Building, 1 Hausel Road, Wilmington, Delaware 19801.

JURISDICTION

3. At all times relevant herein, the defendant, Diamond State Port Corporation. (hereinafter referred to as "Diamond State") operated a business of a marine port within the State of Delaware.

4. This Court has original jurisdiction pursuant to 28 U.S.C. §1331 and 29 U.S.C. §1161 et.seq. regarding COBRA post-employment health insurance continuation coverage.

5. The venue in this matter lies in this district under 28 U.S.C. §1391(b), as all of the defendant's actions occurred in the District of Delaware.

FACTS

6. The plaintiff, Kenneth Swann, was hired by the defendant on November 1, 1975.

7. The plaintiff, Kenneth Swann, was injured during the course of his employment on November 6, 2001.

8. As a result of the injuries suffered by the plaintiff, Kenneth Swann on or about November 6, 2001 the plaintiff, Kenneth Swann was notified on February 3, 2006, by a letter from the defendant, that his employment was terminated that date, effective December 1, 2001.

9. By the letter dated February 3, 2006 notifying the plaintiff, Kenneth Swann of his termination of employment, he was informed that the defendant's representative COBRASERVE would provide him, "in a timely matter" notification of his right for continued medical coverage through COBRA.

10. The letter of February 3, 2006 informed the plaintiff, Kenneth Swann that his health insurance terminated as of February 1, 2006.

11. At the request of the defendant, Diamond State, Diamond State's COBRA representative, COBRASERVE sent plaintiff, Kenneth Swann notice of his COBRA rights on June 5, 2006.

12. COBRASERVE's notice to the plaintiffs of June 5, 2006 represented that plaintiff, Kenneth Swann's date of termination was May 31, 2006, notwithstanding the notice of his termination contained in defendant's letter of February 3, 2006.

13. As a direct result of the termination of the plaintiff, Kenneth Swann's employment and his employment benefits, and the failure to provide him timely COBRA notice, the plaintiffs have incurred uninsured medical expenses in excess of \$5,600.

COUNT I

Failure to Provide Notice under COBRA
(29 U.S.C. §1161 et.seq.)

14. The plaintiffs incorporate herein and makes a part hereof the allegations contained in paragraphs 1 through 13.

15. The plaintiff, Kenneth Swann was a covered employee within the meaning of 29 U.S.C. §1167(2).

16. The plaintiff, Kenneth Swann was an individual who was employed by the defendant, and was covered under the Diamond State's Healthcare Plan provided through Delaware Blue Cross and Blue Shield, for which the defendant was the plan administrator, sponsor, and fiduciary.

17. The Diamond State's healthcare plan is a "group health plan" within the meaning 29 U.S.C. §1167 and/or a "multi-employer plan" within the meaning of 29 U.S.C. §1002(37)(A)(i).

18. The plaintiff, Kenneth Swann's termination was a qualifying event within the meaning of 29 U.S.C. §1163(2).

19. The defendant, Diamond State, was required to notify the plaintiff, Kenneth Swann of his right to elect to continue health coverage for an 18 month period following his termination pursuant 29 U.S.C. §1162(2)(a)(i).

20. The defendant, Diamond State, was required to notify the plaintiff, Kenneth Swann that he had 60 days from the date of his termination to elect COBRA continuation coverage pursuant to 29 U.S.C. §1165(a)(1)(B).

21. The defendant, Diamond State, was required to notify Diamond State's Health Plan administrator, sponsor, and fiduciary of Diamond State's healthcare plan of the plaintiff, Kenneth Swann's termination within 30 days, pursuant to 29 U.S.C. §1166(a)(2).

22. The defendant, Diamond State, acting as the Healthcare Plan administrator, sponsor, and fiduciary of the healthcare plan, was required to notify the plaintiff, Kenneth Swann of his right to elect continuation coverage under COBRA within 14 days of notification from the defendant, On-Site, pursuant to 29 U.S.C. §§1166(a)(4)(A) and 1166(c).

23. The defendant was required to notify the plaintiff, Kenneth Swann that he had 45 days after the date of the election of continued coverage in which to make the first premium payment pursuant to 29 U.S.C. §1162(3).

24. The defendant was required to set a premium for COBRA continuation coverage at a rate not exceeding 102% of the applicable premium pursuant to 29 U.S.C. §1162(3)(A).

25. The defendant has failed to provide any of the timely notices required by the statutes listed herein.

26. The defendant's actions violated the notice requirements of 29 U.S.C. §§1165(1), 1162(3) and 1166(a)(2)

27. As a result of the defendant's violations of Federal Law, the plaintiffs and the plaintiffs' family have been without necessary medical coverage and have suffered damages.

28. As a further direct and proximate result of the defendant's violation of Federal Law the plaintiffs have suffered great mental pain, suffering and anguish.

WHEREFORE, the plaintiff demands judgment against the defendant as follows:

a. A judgment in a fair and reasonable amount against the defendant and in favor of the plaintiffs for any damages suffered by the plaintiffs.

- b. For statutory liquidated damages.
- c. For prejudgment and post-judgment interest.
- d. For any other consequential damages.
- e. For reasonable attorney fees.
- f. For such other and further relief as this Court deems just and appropriate.

ABER, GOLDLUST, BAKER & OVER

/s/ Gary W. Aber
GARY W. ABER (DSB #754)
702 King Street, Suite 600
P.O. Box 1675
Wilmington, DE 19899
(302) 472-4900
Attorney for Plaintiff

DATED: June 1, 2007

js 44

(REV. 07/89)

CIVIL COVER SHEET

07-350

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS OF THE REVERSE OF THE FORM.)

I (a) PLAINTIFFS Kenneth C. Swann, and Rebecca Swann b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF <u>New Castle</u> (EXCEPT IN U.S. PLAINTIFF CASES)	DEFENDANTS Diamond State Port Corporation COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT <u>New Castle</u> (IN U.S. PLAINTIFF CASES ONLY) NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED												
(c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER) Gary W. Aber, Esquire, Aber, Goldlust, Baker & Over, 702 King Street, Suite 600, Wilmington, DE 19801	ATTORNEYS (IF KNOWN)												
II. BASIS OF JURISDICTION (PLACE AN X IN ONE BOX ONLY) <input type="checkbox"/> 1 U.S. Government Defendant <input checked="" type="checkbox"/> 3 Federal Question <input type="checkbox"/> 2 U.S. Government Defendant <input type="checkbox"/> 4 Diversity (Indicated Citizenship of Parties in Item III)	III. CITIZENSHIP OF PRINCIPAL PARTIES (PLACE AN X IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT) (For Diversity Cases Only) <table style="width: 100%;"> <tr> <td style="width: 50%;"> Citizen of This State PTF DEF <input checked="" type="checkbox"/> 1 <input type="checkbox"/> 1 Citizen of Another State <input type="checkbox"/> 2 <input type="checkbox"/> 2 Citizen or Subject of a Foreign Country <input type="checkbox"/> 3 <input type="checkbox"/> 3 </td> <td style="width: 50%;"> incorporated or Principal Place Of Business in This State PTF DEF <input type="checkbox"/> 4 <input checked="" type="checkbox"/> 4 Incorporated and Principal Place Of business in Another State <input type="checkbox"/> 5 <input type="checkbox"/> 5 Foreign Nation <input type="checkbox"/> 6 <input type="checkbox"/> 6 </td> </tr> </table>	Citizen of This State PTF DEF <input checked="" type="checkbox"/> 1 <input type="checkbox"/> 1 Citizen of Another State <input type="checkbox"/> 2 <input type="checkbox"/> 2 Citizen or Subject of a Foreign Country <input type="checkbox"/> 3 <input type="checkbox"/> 3	incorporated or Principal Place Of Business in This State PTF DEF <input type="checkbox"/> 4 <input checked="" type="checkbox"/> 4 Incorporated and Principal Place Of business in Another State <input type="checkbox"/> 5 <input type="checkbox"/> 5 Foreign Nation <input type="checkbox"/> 6 <input type="checkbox"/> 6										
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IV. CAUSE OF ACTION (CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE. DO NOT CITE JURISDICTION STATUTES UNLESS DIVERSITY) 28 U.S.C. § 1331													
V. NATURE OF SUIT (PLACE AN X IN ONE BOX ONLY)													
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VII. REQUESTED IN COMPLAINT: <input type="checkbox"/> UNDER F.R.C.P. 23 CLASS ACTION DEMAND \$ Check YES only if demanded in complaint: JURY DEMAND: <input checked="" type="checkbox"/> YES <input type="checkbox"/> NO													
VIII. RELATED CASE(S) IF ANY (See instructions) JUDGE _____ DOCKET NUMBER _____													
DATE June 1, 2007 SIGNATURE OF ATTORNEY OF RECORD													
UNITED STATES DISTRICT COURT													

AO FORM 85 RECEIPT (REV. 9/04)

United States District Court for the District of Delaware

Civil Action No. - 07 - 350 -

ACKNOWLEDGMENT
OF RECEIPT FOR AO FORM 85

NOTICE OF AVAILABILITY OF A
UNITED STATES MAGISTRATE JUDGE
TO EXERCISE JURISDICTION

I HEREBY ACKNOWLEDGE RECEIPT OF 1 COPIES OF AO FORM 85.

6/1/07

(Date forms issued)

Jonathan Durandetta

(Signature of Party or their Representative)

Jonathan Durandetta

(Printed name of Party or their Representative)

Note: Completed receipt will be filed in the Civil Action